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Property Distribution Physics: The Talisman of Time and Middle Class Law

MARGARET F. BRINIG*

I. Introduction

Should the young professional's spouse get some share in a newly acquired career while the young military officer's will not? Does the division between alimony and property make any sense, given no-fault divorce? Is reimbursement for lost career opportunities plus a share in the couple's tangible property fair compensation for a divorcing spouse? Such difficult questions frame this piece, which will also—and I believe necessarily—digress into the nature of marriage, the duties of parenting, and modern divorce philosophy.

I begin this rather ambitious undertaking by reporting a class discussion. Early last fall, a student in my family law class asked whether family law is best rationalized from a middle-class American's perspective. When I reached the topic of equitable distribution several weeks later, I reminded the class about the question, and asked what *Mahoney*¹ reveals about that bias, since professional degrees are only relevant for upper middle class families.² I was attempting to set up a series of

* Professor of Law, George Mason University. I thank Alan E. Koczela and Jana M. Singer for their thoughtful comments as well as research support from the George Mason University School of Law.

1. *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982). *Mahoney* is a principal case in standard family law casebooks. See, e.g., CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW (1996); WALTER WADLINGTON, DOMESTIC RELATIONS (2d ed. 1990).

2. The literature on professional degrees is quite voluminous. For articles written before 1983, see sources cited in *Haugan v. Haugan*, 343 N.W.2d 796, 800 & n.3 (Wis. 1984).

questions I would ask later that would extend the concept of *Mahoney* to other and broader situations.³ Contemporary family law understands that alimony deals with claims on future earnings streams,⁴ while property division (at least as seen by divorce lawyers and perhaps law reformers)⁵ deals with the past acquisition property that is typically tangible.⁶ The legal distinctions may be relatively clear. Thus, for tax treatment, alimony and property at least traditionally were quite distinct categories.⁷ Further, alimony, but not property division,⁸ is both modifi-

3. See, e.g., *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989); *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. App. Div. 1988); *Elkus v. Elkus*, 572 N.Y.S.2d 901 (N.Y. App. Div. 1991). These cases all involve career enhancement, but not professional degrees.

4. *Aufmuth v. Aufmuth*, 152 Cal. Rptr. (Cal. Ct. App. 1979). For an extended discussion of this principle, see Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1985). See also Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990).

5. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Tentative Draft May 1996) [hereinafter ALI Tentative Draft]. Section 4.07 provides: (1) "Spousal earning capacity, spousal skills, and post-dissolution spousal labor are not property divisible on divorce." Consistent with this interpretation, section 2 provides that occupational licenses and educational degrees are not property divisible on divorce. "The principle underlying this difference [between alimony and property] is that marriage creates property entitlements to certain *things* acquired during it, but does not create property entitlements against the *person* of the other spouse." *Id.* at 173, cmt. a.

6. *Bussewitz v. Bussewitz*, 248 N.W.2d 417, 420 (Wis. 1977) (marital estate consists of the "assets of the parties as they exist at the time of the divorce"). An exception is for goodwill. See ALI Tentative Draft, *supra* note 5, § 4.07(3)(b); *Dugan v. Dugan*, 457 A.2d 1, 9 (N.J. 1983). See generally Grace Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workmen's Comp, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250, 1260-64 (1986); THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY 7-69 (1991). Another exception is for pensions. See ALI Tentative Draft, § 4.08(1); *Moore v. Moore*, 553 A.2d 20 (N.J. 1989).

7. Section 71 of the IRC makes alimony deductible by the payor and taxable to the payee. I.R.C. § 71 (1995). Property distribution caused a capital gain to accrue to the spouse who originally owned it, while the recipient received the property at its new basis, *U.S. v. Davis*, 370 U.S. 65 (1962), until the Domestic Relations Tax Reform Act of 1984 provided that it should be treated for income tax purposes as a gift (not a taxable event; recipient retains old basis). I.R.C. § 1041 (1995).

8. See ALI Tentative Draft, *supra* note 5, § 4.07:

"Earning capacity" has no meaning or existence independent of the method used to measure it. It is generally measured by finding a present value for all or some part of the individual's future earnings, and is thus no more than a shorthand term for that present value. A rule characterizing earning capacity as marital property is a rule treating future earnings as marital property, which in operation requires that those earnings be estimated at divorce so that their present value can then be fixed and allocated between the spouses.

able and the subject of contempt enforcement.⁹ Despite these legal differences, the economist sees no real distinction between the various forms of financial allocation. The bridging concept is that of human capital, which was first popularized in the family law context by Joan Krauskopf.¹⁰

As the economist sees it, alimony "frozen" in time (the present) is simply another form of property. (My faulty physics analogy is that energy, confined to one place, is what we see as material objects.) Thus finance models see stock prices reflecting the market's anticipation of all future dividends and other appreciation.¹¹ If a divorcing spouse has any claim to joint property, it is worth thinking about why it can only be a claim to the fixed share (or "stock") rather than the ongoing stream (or "flow").¹² The problem becomes particularly acute in cases like *Mahoney* and in most modern marriages, where at the time of

9. Modification is discussed in ALI Tentative Draft, *supra* note 5, § 5.09, at cmt. a ("Alimony awards, unlike the allocations at divorce of marital property, are traditionally modifiable to reflect changes in the parties' circumstances that arise after the initial decree is rendered."). For the difference in courts' enforcement powers, see *Picker v. Vollenhover*, 290 P.2d 789 (Or. 1955).

10. Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980). One persistent advocate of many of the themes I explore here, though holding some different conclusions, is Allen Parkman. See, e.g., ALLEN M. PARKMAN, *NO FAULT DIVORCE: WHAT WENT WRONG?* (1992); Allen M. Parkman, *Human Capital as Property in Celebrity Divorces*, 29 FAM. L.Q. 141 (1995). Gary Becker did the pioneering work on human capital. GARY S. BECKER, *HUMAN CAPITAL* (3d ed. 1993). See also Singer, *supra* note 4, at 1115 (another view of how sharing of the marital assets might be made more equal).

11. ROBERT C. POZEN, *FINANCIAL INSTITUTIONS: CASES, MATERIALS AND PROBLEMS IN INVESTMENT MANAGEMENT* (1986); Frank H. Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 AMER. ECON. REV. 650 (1984). See also Parkman, *supra* note 10, at 146. The corporation might also be financed through debt (bonds), with the stream of income interest as opposed to dividends. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 371 (3d ed. 1988); Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984). See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FINAN. ECON. 305 (1976).

12. In contrast, the classic case of *Graham v. Graham*, 574 P.2d 75, 77 (Colo. 1978), noted that:

An educational degree, such as an M.B.A. is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. . . . In our view, it has none of the attributes of property in the usual sense of that term.

However, a professional license was recognized to be property in one state. *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985). See also *Ciobanu v. Ciobanu*, 409 S.E.2d 749, 751 (N.C. Ct. App. 1991) (spouse's contribution recognized as a contribution to separate property).

divorce the most valuable things the spouses own are not their homes or cars, but their future earning capacities.¹³ Economist Allen Parkman gives a partial answer to the question of why earning capacities are not divided. In his *No Fault Divorce: What Went Wrong?*,¹⁴ he posits that the portion of this human capital acquired during marriage is in fact a small one: the business, medical, or law degree could not be earned without substantial pre-marriage preparation and investment in grade school through college.¹⁵ As will be demonstrated presently, I disagree with this portion of his analysis.

In class, I continued my discussion of property division by asking why, given no-fault divorce, Mrs. Mahoney might reasonably expect reimbursement.¹⁶ In other words, why is Melvin Mahoney's enrichment "unjust"? Why does *she* not have a *duty* to support him? My own belief is she does, and therefore this particular case is not particularly appealing on its facts. It is much easier to argue the principle when the working spouse pays for the tuition or delays his or her education. In *Mahoney*, Melvin's tuition was paid by the government.

To pick up on the Parkman point, I ask my class how much of the value of Melvin's degree comes from investments prior to marriage (i.e., in high school and college). As noted above, Parkman maintains the proportion earned during marriage may be quite small. As an empirical matter, law students, particularly those married to other professionals, feel there really is something special going on that affects both spouses when one obtains a professional degree.¹⁷ The hours of preparation, the indignities of being called on repeatedly in class, and the lack of any outside-school "life" push law school far beyond the rigors of undergraduate or high school studies. These add to the law student's stress and are part of his or her unique investment. To the extent they affect the spouse as well, they are part of the spouse's investment in the way that tolerating the more relaxed undergraduate study can never be.

If we wish to look at career enhancements as a special investment, we might reason as follows:¹⁸ Suppose a builder always wanted to own an apartment building. He read and studied apartment management

13. Thus, Lenore Weitzman calls future earnings the "diamonds" of marital property. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 109 (1985). They are "often the most valuable assets a couple owns." *Id.* at 141.

14. See generally *supra* note 10.

15. See also Parkman, *supra* note 10, at 147.

16. In addition to *Mahoney*, see *Lehmick v. Lehmick*, 489 A.2d 782 (Pa. Super. Ct. 1985) (compensation for financial support).

17. See *id.* (Weiland, J., concurring and dissenting) ("In a sense, the spouse who contributes to the other's obtaining of a degree has made a marital investment.").

18. I acknowledge my intellectual debt to Alan Koczela, who argued this point with me.

before he married, but waited until marriage before building the property largely with his own two hands. At divorce, the building and its rental stream would be shared with his spouse, though the knowledge of apartment management and construction was entirely acquired before marriage. For a more contemporary example, consider Microsoft Corporation's initial public stock offering. CEO Bill Gates could have gone to the bank for a loan or issued debt (bonds) in the company. Instead, he offered part ownership in the residual claims generated by the firm (stock). He made this choice because he thought the benefits of "going public" outweighed the costs.¹⁹ If the initial public offering price were \$20 per share, could he later claim after the stock price climbed to \$100 per share that the stockholders "only provided financing for his projects," while his vision for Windows 95 and all his other ideas were completely formed before the public offering? Should the investors be satisfied with the dividends they received while owning the stock, and before Gates reneged? Clearly this would not seem any more fair than Parkman's limitation does.

I wondered in class how much a "degreed spouse" like Melvin will be stifled in future years if his degree (or professional license) is called property and divided now. How do we know he will not die in three years, and therefore not realize his expected income?²⁰ What I am getting at is that expected value, used to award the present value of Mr. Mahoney's degree, takes care, by definition, of the prognosis for the *average* degree holder.²¹ But is that the award a court should make in a divorce case, or should it be concerned with this particular obligor

19. He might have made this decision because a mixture of debt and equity enables the corporation to provide different risk-return packages to meet the varying preferences of investors (lenders and stockholders). The expected return of bonds is less than that of both unsecured creditors and stockholders. See POSNER, *supra* note 11, § 14.4 & n.1.

20. There was a young lawyer, Daniel Huston, who was murdered outside a Washington-area nightclub recently. Arlo Wagner, *Carjacking Death Stuns Victim's Friends and Family*, WASH. TIMES, Sept. 11, 1994, at A10. His alleged assailants were sentenced in November of 1995. Brian Mooar, *Two Men Sentenced to Life in Killing Outside Club*, WASH. POST, Nov. 29, 1995, at D1. Problems for degree division like those posed by premature death are discussed in *Haugan v. Haugan*, 343 N.W.2d 796 (Wis. 1984).

21. The expected value of an (good) asset of P currently worth \$100 is calculated as follows:

Say we want to know its expected value in a year. There is an 80% probability that it will have a normal rate of return, and be worth \$110. There is a 10% probability that it will do exceptionally well, and be worth \$120, and a 10% probability that it will do badly, and be worth only \$105.

$$\begin{aligned} \text{EV}(P) &= (.8 \times \$110) + (.1 \times \$120) + (.1 \times \$105) = \\ &\$88 + \$12 + \$10.50 = \$110.50. \end{aligned}$$

See JOHN VON NEUMANN & OSKAR MORGENTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1964).

who is bound in this way? If the court should be concerned with each particular obligor as an individual, how can it obtain the information necessary to calculate the individual degree's expected value? For example, it may be relatively easy to judge the expected earnings of an accountant. The variance is far greater for an exceptional athlete, who may end her career after only a few years or make millions of dollars as a professional.²² Each type of career enhancement probably is associated with unique risk characteristics.²³ It is the exceptional or extraordinary earnings the spouse receives that provide the difference over, say, the average spouse with a couple of years of college.²⁴ If the projected earnings are way off the mark by being much higher or lower, I will argue later that the disappointed spouse should be able to modify the remaining amounts to be paid.

I then asked my class a series of questions, some real, some hypothetical, about other investments in the spouse that might be covered by the reasoning in *Mahoney* and the other degree cases. Should a spouse be compensated for sacrifices made for an officer in the Armed Forces? Would the rule be the same for an IBM executive's husband who has had to move every few years?²⁵

Last fall my class included several wives of servicemen and a couple of married servicemen. The wives were quite vocal about their own experiences in moving around the world with their mates, about their not being able to hold meaningful jobs, and about their continual entertaining to support career advancement. The class seemed to suddenly grasp how all spouses sacrifice and invest in each other, so that confining compensation only to degree cases like *Mahoney* seems less than fair. On the other hand, New York has had real problems as I see it dealing with a kind of commercialization of marriage that is set in the reported cases following *O'Brien*. I am thinking in particular of one case where a doctor and lawyer, I believe, had each put the other through school

22. In class, I have long used the example of sports personality Joe Theisman, who was a college quarterback at the time of his first marriage.

23. The lawyer arguing for a share of enhanced earnings could obtain statistics on the percentage of people certified for a particular career that lose their certification or otherwise cease to use the enhancement prior to normal retirement age.

24. Recent data from Connecticut indicate that the average education of divorcing wives from 1993-95 was 13.218 years and for their husbands was 13.076 years. CONN. DEP'T OF PUBLIC HEALTH, OFF. OF POLICY, PLANNING AND EVALUATION (1993-95) (electronic data available from author; maximum years recorded was 17 for all post-college work).

25. Cases I use in class include *Piscopo v. Piscopo*, 557 A.2d 1040 (N.J. Super. Ct. 1989) (comedian); *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. App. Div. 1988) (actress and model). A businessman's wife's sacrifices for her husband's career were recognized in *Meinholz v. Meinholz*, 678 S.W.2d 348 (Ark. 1984).

and were now, to the court's chagrin, claiming shares in the other's earning capacity.²⁶ If the serviceman's and the executive's spouses should be compensated, what about the long-term investment of Robert Lucas' wife in his Nobel Prize in economics?²⁷ If the couple had not agreed in writing that she would be given a share if he got the prize during the next five years, she certainly should be entitled to some claim.

Some might argue that we should give the supporting spouse a share in the other's enhanced earning capacity to correct incentives disturbed by no-fault divorce and the ability to leave marriage at will. Spouses secure in their investment would be more willing to make the sacrifice that will pay off only in the future, perhaps only after the marriage has ended. It is also possible, as we will discuss later, that an incentive to avoid being at fault will be created or strengthened in jurisdictions where property division is affected by fault. Without any compensation, we can expect the efficient²⁸ way of encouraging higher education that marriage affords to dry up or at least decrease.²⁹ But this incentive-based theory suffers from the same criticisms as does an incentive rationale for alimony:³⁰ it does not present a reason *why* the degree ought to be awarded, as opposed to an equitable basis for such an award. This comparison is not an idle one, for as we have seen already, alimony and marital property division can properly be viewed as species of the same thing.³¹

26. *McSparron v. McSparron*, 662 N.E.2d 745 (N.Y. 1995). The lawyer husband argued unsuccessfully that his degree had merged with his practice, since the Juris Doctor was obtained in the early days of the marriage. The court rejected this view, noting that his future earnings, unlike the doctor wife's, could be calculated based upon actual past earnings.

27. See, e.g., Editorial, *A Prize Ex-Husband; Divorce Doesn't Doom a Wife's Stake in a Nobel*, PITTSBURGH POST-GAZETTE, Oct. 30, 1995, at A14.

28. At a minimum, a spousal investment avoids the transaction costs associated with commercial loans. Such a family source of funding may be the only one available to some poor but promising spouses.

29. The investment in the unit, as opposed to the self, is part of what strengthens marriages in the first place. Compare Marjorie M. Shultz, *Contractual Ordering of Marriage: New Directions for State Policy*, 70 CALIF. L. REV. 204, 264 (1982), with Margaret F. Brinig & Steven Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 883 (1991).

30. June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1991) (commenting on Ira M. Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989) which has a strong incentive rationale). Another critical comment on Ellman is Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. (1991).

31. See *Golub v. Golub*, 527 N.Y.S.2d 946 (N.Y. App. Div. 1988) ("[A]ll sorts of enhanced earning capacity cases are indistinguishable. . . . There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income.").

Alternatively, one might worry about negative incentives that might be caused by allowing recoveries in earnings enhancement. Men might theoretically be less willing to marry if they knew they might have to compensate for enhanced earnings at divorce.³² My reply begins with the observation that following the introduction of no-fault divorce, the marriage rate decreased.³³ Saying the two facts are related poses a *post-hoc-ergo-propter-hoc* problem. But if other factors, such as rising wages for women or the trend toward completion of graduate as well as undergraduate education are factored out, a marked decrease remains.³⁴ Further, women are less happy than in the single state and men are more happy in late twentieth century marriages.³⁵ Women, then, currently have an incentive *not* to marry, since no-fault divorce makes marriage more attractive for their mates and less so for them.³⁶ Since both spouses must agree to marry, the decline in the marriage rate seems likely to be caused by an increasing reluctance of women to tie the nuptial knot. Allowing spouses' claims in earning capacity (especially when the marriage has lasted for many years) would seem to make marriage more attractive to women, thus evening out the incentives that no-fault has skewed, and leading to an increase in the marriage rate (at least to the pre-no-fault level).

Thus one possibility is there will be no decline in marriages because women, who might now hold back, will be more willing to enter marriages. The other, and perhaps equally likely, result is some men will hesitate to marry because they will have to share their (usually greater) earning capacity if the marriage fails. The response resembles the retort when promises to marry became unenforceable.³⁷ It is, in effect, "good

32. My research assistant, Joel Traylor, suggested this problem.

33. For a recent case in which a sociologist testified about this fact, see *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. 1996). See also Brinig & Crafton, *supra* note 29, at 334 (the authors use multivariate time series regression analysis to focus on the effect of no-fault divorce). See also H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Ordering*, 76 AM. ECON. REV. 437, 443-44 (1986); Lloyd Cohen, *Marriage, Divorce and Quasi-Rents, Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL. STUD. 267, 296 (1987).

34. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988).

35. See, e.g., Lois Verbrugge & Jennifer Madans, *Women's Roles and Health*, AM. DEMOGRAPHICS 35 (Mar. 1985). See also Parkman, *supra* note 10, at 99-101. Parkman argues in a recent paper that women are working "double duty to protect against no-fault." ALLEN PARKMAN, *WHY ARE MARRIED WOMEN WORKING SO HARD?* (Working Paper, Dep't of Management, Sch. of Bus. and Management, U.N.M., 1996).

36. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 L. & HUM. BEHAV. 439 (1993).

37. See Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORGAN. 203 (1990) (discusses the decline of the breach of promise action). For a good argument for abolition of the related tort of seduction, see Walter Wadlington, *Shotgun Marriage by Operation of Law*, 1 GA. L. REV. 183 (1967).

riddance.” If a person will marry only when he can take advantage of his spouse, the relationship may well not be worth having. Marriage as an institution exists at least in part to create opportunities for reliance, investment,³⁸ and sharing.

II. Why Should a Spouse Share in Earning Capacity?

When a couple marries, they share.³⁹ They take advantage not only of their mutual affection, but also of savings that are reached because of a relative abundance of time. This is related not only to the gains in time when a community moves from hunting to agriculture and technology improves,⁴⁰ but also to economies of scale.⁴¹ Usually we think of the lowered costs of living in one household (or, conversely, the increase when one household is split into two and scale economies are lost),⁴² but there is also the fact that only one spouse need stay home to let in the appliance repair person or (in my part of the country) the exterminator. Time unites these two concepts of the exchange of alimony and property, and the type of investment that is made when a couple marries.

In finance theory there is an accepted way in which time relates “stocks,” or capital assets, and “flows,” or future earning streams. According to at least one widely accepted theory, investors price shares of stock according to the corporation’s expected future return,⁴³ discounted for nondiversifiable risk.⁴⁴ Differences in opinion among market participants about the correct price of stock are resolved through

38. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990); Brinig & Crafton, *supra* note 29; Cohen, *supra* note 33.

39. Douglas W. Allen, “What Does She See in Him?” *The Effect of Sharing on the Choice of Spouse*, 30 ECON. INQUIRY 57 (1992).

40. A recent best-selling discussion of one such change is THOMAS W. CAHILL, *HOW THE IRISH SAVED CIVILIZATION* (1995).

41. For a business school source, see ALFRED CHANDLER, *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* (1990).

42. Though this proposition seems obvious, a citation is *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978). See also SCHNEIDER & BRINIG, *supra* note 1, at 971.

43. “Expected return” means the average of all possible returns, each discounted for its probability. See WILLIAM A. KLEIN, *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 145-46 (1980); POSNER, *supra* note 11, at § 15.1 & n.1.

44. See RICHARD BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 137-40 (1981) (describing the Capital Asset Pricing Model, a formula using expected return, defined as anticipated dividends and appreciation produced by the corporation, and “beta,” defined as market or nondiversifiable risk); Jeff N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 825-27 (1985); Parkman, *supra* note 10, at 146; POSNER, *supra* note 11, at 407-08.

trading.⁴⁵ Simply put, those investors who think the price is too low buy, while those who think the price is too high sell. In this way, the market reaches a consensus about the corporation's (and the market's) future prospects, and the trading price of the company's stock reflects this consensus.

The allocation of time, and its relation to marriage, is in fact the subject of one of Gary Becker's pathbreaking articles.⁴⁶ Becker sees workers as dividing their time between labor and leisure. They have only twenty-four hours to divide, and wish to maximize the amount of leisure they have and also the depth of enjoyment they may have when resting (for example, access to cruises or cable television). When one spouse stays out of the job market to raise children or manage the household, the opportunity cost of the time is what is given up, and presumably the use of this time in the household is more valuable than whatever would be gained, financially or otherwise, by that spouse's remaining in the labor force.⁴⁷ This is also the reason why married men with similar qualifications do better in the business world and as far as health is concerned than do single men. Someone else is supplying them with the time (and freedom from distractions) to allow them to perform at their best. A good analogy from the student world is the

45. Assets with the same risk should have the same return. In other words, prices of assets traded in capital markets should be adjusted by profit seeking activity, called arbitrage, until assets of equivalent systematic risk have the same expected return. POSNER, *supra* note 11, at 405.

Obviously, "trading" cannot occur directly in the marital situation—though that is perhaps how degrees are "valued" by the couple before the education begins, or at the time of divorce. The couple contemplating graduate school for one spouse thus makes what I now refer to as a "side deal." Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TULANE L. REV. 855, 877-82 (1988). As Mahoney put it, "Only monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits should be a basis for such an award." 453 A.2d at 535.

The *Reliance* article, but not my shorthand for the concept, refers to the difference between the lost opportunity to marry another and the lost career opportunities. Trading—of a less valuable one for one with greater value—allegedly occurs in some Hollywood marriages. For example, see Cohen, *supra* note 33.

46. Gary S. Becker, *On the Allocation of Time*, 75 ECON. J. 492, 512 (1991); GARY S. BECKER, A TREATISE ON THE FAMILY 1145-46 (2d ed. 1991) [hereinafter BECKER, TREATISE]. See also Margaret F. Brinig, *A Comment on Jana Singer's Alimony and Efficiency*, 82 GEO. L.J. 2461 (1994).

47. Carol Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker's Services*, 10 FAM. L.Q. 101 (1976). It has been estimated that, on average, the value of the wife's household production is equal to more than 70% of the household's money (or market) income after taxes, implying that even if she remains out of the paid labor force, she generates 40% of the household's full income. Reuben Gronau, *Home Production—A Forgotten Industry*, 62 REV. ECON. & STAT. 408 (1980).

residential college, for in college, at least, most housekeeping functions in a dormitory are assumed by the university (the stay-at-home spouse surrogate).

III. The Validity of a Marital Partnership Claim

Marriage is obviously a complex human activity. Among its other benefits, it gives spouses a chance to create a family in an atmosphere of trust and intimacy.⁴⁸ Less obviously, perhaps, it furnishes security. The married person enjoys security against the vagaries of the marriage market.⁴⁹ Further, a committed partner who can work if one loses a job, or who can perform physical tasks if one becomes ill or disabled, supplies a kind of insurance against illness and unemployment.⁵⁰

Marriage also provides some obvious financial benefits. Having one household instead of two means one rent or mortgage check, one set of utility bills and food purchases in larger, less expensive per unit, quantities. If, as Gary Becker urges, one spouse specializes in managing the household's finances, car maintenance, or grocery shopping,⁵¹ there are obvious gains which, of course, may be outweighed by the fun in doing a joint activity. If the specialization goes further, where one spouse has primary responsibility for paid employment and the other for household management, the married people are both making a substantial investment in their relationship. If, like most couples, they marry when they are relatively young and beginning careers in the workplace, there will probably be substantial investments in one or both careers.⁵²

These investments may be of the obvious kind—one spouse may finance the other's advanced degree—or may be more subtle. We have seen two of these less obvious kinds already. One may take the more flexible job in order to accommodate childrearing or the more prosaic repair people who need access to the home. One spouse may follow

48. MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993); Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573 (1994).

49. PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT AND GENDER* 31-42 (1987) (suggest in their chapter on courtship that one assesses a "D" desirability level and then gets engaged (stops looking) when the best offer seems to outweigh the probability of getting someone better).

50. This idea is related to that of Dean Professor Scott, who suggested in conversation that alimony is a kind of insurance against the marriage not working out. Telephone conversation of August 15, 1996. Marriage in itself furnishes insurance against some of the other catastrophes possible in life. Gary S. Becker, *The Economic Way of Looking at Behavior* (Nobel Address), 101 J. POL. ECON. 385 (1993).

51. BECKER, *supra* note 46, at 30.

52. Cohen, *supra* note 33.

the successful upwardly mobile executive through a series of rotations across the country or through foreign tours of duty in the armed forces. The corporate, diplomatic or military career may require substantial entertaining or relationship-building by the other spouse. Frequently all these domestic investments take many years to bear fruit. Sometimes, the obvious alternative to having the other spouse accommodate would be a commercial loan.

Thus, marriage forms a "firm" in which the couple maximize, among other things, the total earnings of the firm.⁵³ A greater investment in one spouse may be optimal for the couple, while such an investment strategy would be sub-optimal without marriage. For example, without marriage, both spouses might get college degrees, each earning \$500,000 over the course of their lifetimes. With marriage, one spouse may well forego the degree while the other earns an M.D. expected to earn \$2 million over the spouse's life. The optimal "joint" strategy for such a couple during the marriage is for one spouse to stay home or otherwise assist the other, while the other pursues the doctorate. This strategy would not be optimal without marriage.

Marriage also signals to the outside world that the married person is more stable than a single one of comparable age.⁵⁴ Married people in their twenties, for example, are typically more conscientious and better drivers and health risks⁵⁵ than their single contemporaries. They are therefore more apt to be lent money or given positions of responsibility.⁵⁶ The outsider looking at a married person is more confident (because of the pattern observed with other couples and singles) that he or she can afford a nice car, a large home, or a trustworthy position as a manager.

Since the early 1970s, marriage has often been pictured as this kind of partnership:⁵⁷ one in which contributions are difficult to measure, but clearly both spouses gain so long as the relationship remains intact. However, as with many joint enterprises, how to best and most fairly

53. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993).

54. William Bishop, *Is He Married? Marriage as Information*, 34 U. TORONTO L. REV. 245 (1984). See also Yoram Ben-Porath, *The F-Connection: Families, Firms, Friends and the Organization of Exchange*, 3 POP. DEV. REV. 1, 6 (1985).

55. See, e.g., Jean Utz Griffin, *Marriage, Health, Still a Two-Some*, CHI. TRIB., Nov. 16, 1988, at C8; William R. Mattox, Jr., *Even a Nagging Wife is Better than None*, CHI. SUN-TIMES, Aug. 5, 1996, at 16.

56. They also earn more than their single contemporaries. See *infra* note 83.

57. Bea Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990). See also Rothman v. Rothman, 320 A.2d 496 (N.J. 1974); Sally B. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247 (1983); Singer, *supra* note 4, at 1117-18; Starnes, *supra* note 53.

compensate the spouses' efforts has proven intractable.⁵⁸ One obvious alternative that works in the commercial, but not in the domestic context is to "pay by the piece," allowing recompense based upon the result produced.⁵⁹ But, a court might find it burdensome to value the better business relationships forged during a spouse's surprise birthday party, and impossible to account for the success of children in school or on the basketball court.⁶⁰ A salary arrangement sounds distasteful for marriage.⁶¹ Economists⁶² suggest allowing entrepreneurs (again, in the business context) a share in the profits of a firm gives them the appropriate incentives. They put forth their best efforts because they will prosper as the firm does.⁶³ Without divorce, spouses might love each other enough to do this anyway. As long as the marital unit remains intact, and as long as spouses care for each other, the deep hurts caused by such things as belittling the homemaker's efforts are unlikely to occur.⁶⁴ However, in a world where not all marriages last until death parts husband and wife, judges and attorneys often must value the claim.

IV. What Is the Nature of the Residual Claim? A Look at Civil Compensation

Although undertaking marriage entitles one to a residual claim, like the owner's claim on a firm, several questions remain. The first is

58. The ALI solution, regarding both alimony and property division as facets of the same problem, of course, resembles the analysis here. The difference is the Tentative Draft's emphasis on the career opportunity loss side of the equation, rather than the gain from such an investment. ALI Tentative Draft, *supra* note 5. In fact, the problem is similar to the one June Carbone and I analyzed. June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 957-61 (1991) (discussing forms of civil compensation). I would award not only for career losses, but also interest on those investments made. In other words, I would allow the investing spouse to realize some return on whatever has been contributed to advance the other's career.

59. Ronald W. Coase, *The Nature of the Firm*, ECONOMICA 396 (Nov. 1937). Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1 (1983).

60. Custody awards sometimes seem that kind of "payment." But since children are best off when not viewed as prizes, and *themselves* are actors needing contact with both parents in most cases, rewards of this kind aren't practical either. This ignores the fact that custody of children brings with it responsibility for their care, including financial responsibility, that may be difficult to fulfill by one single parent.

61. This may be what strikes the reader as wrong in the "Rice Husband." See AMY TAN, *THE JOY LUCK CLUB* (1989). Such an arrangement also comes perilously close to concubinage. On the other hand, is tailoring alimony specifically to the share of income for the number of years married (or half of them), a more palatable refinement of the same idea? See Singer, *supra* note 4.

62. See FRANK KNIGHT, *RISK, UNCERTAINTY AND PROFIT* (1921).

63. Armen Alchian & William R. Allen, *EXCHANGE AND PRODUCTION; COMPETITION, COORDINATION AND CONTROL* (2d ed. 1977).

64. See Starnes, *supra* note 53, Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

whether the claim is against the other spouse or against the mutual enterprise, the marital estate. A claim to future earnings is in some important senses a claim against a person.⁶⁵ Clearly the marriage begins one's life anew at least in certain important respects. Yet the spouses "take each other" in the marriage ceremony.⁶⁶ They make promises to another person, complete with individual attributes (attractive and unattractive)⁶⁷ and education and training.

The spouse is worth more⁶⁸ if highly educated and properly employed. Yet, like the entity stock shares represent, the greatest financial value of such a marital partner lies in the expectation he or she will do well.⁶⁹ The spouse who weds the young graduate of Harvard Business School pays more and invests more than the one marrying the high school drop-out pumping gas.⁷⁰

Marriage, and even more the conduct following the promise, is particularly an investment, not just a sacrifice.⁷¹ As investment, the spouses should be rewarded not only with current purchases and living standards (the dividends), but also the promise of future income (the capital gains). We already deal with this troubling feature of the marital investment (troubling because it can not be predicted with certainty)⁷² when we divide pensions upon divorce.⁷³ The spouse may not continue to work

65. See ALI Tentative Draft, *supra* note 5.

66. W. VA. CODE § 48-1-12b (1966).

67. Margaret F. Brinig & Michael V. Alexeev, *Fraud in Courtship: Annulment and Divorce*, 2 EUR. J. L. & ECON. 45 (1994).

68. Allen, *supra* note 39.

69. PARKMAN, *supra* note 35.

70. The "payment" may take one of two forms. The first occurs when the spouse who marries the MBA selects him rather than some other spouse. Presumably *she* has some selection of roughly equally talented young men to choose from. To be in this fortunate position, she must herself be a highly desirable mate. Her opportunity cost (what she gives up) is therefore higher than the comparable cost of the typical bride of a gas station employee. Secondly, being married to a highly successful person carries with it elements of stress, as well as reward, that are part of the price the spouse pays.

71. Compare ALI Tentative Draft, *supra* note 5, at 10-11:

The approach of the Principles is to refocus the alimony inquiry from need to loss. . . . The fundamental problem for both alimony and property is determining when a claim arises—when, in the language of Chapter 5, the potential obligee has incurred a compensable loss. The choice of remedy—alimony or property allocation—is essentially a question of implementation and convenience, rather than a basic principle.

72. See, e.g., *DeWitt v. DeWitt*, 296 N.W.2d 761, 768 (Wis. Ct. App. 1980): Whether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a certain profession may choose not to practice it, may fail at it or may practice in a speciality, location or matter which generates less than the average income enjoyed by fellow professionals.

73. See, e.g., VA. CODE ANN. § 20-107.3 (Michie 1994).

for the same employer until retirement age because of change of job, illness, or early retirement.⁷⁴ The employer's pension fund may not do as well as expected at the time of divorce. What some states do in pension cases is estimate the present value of the pension⁷⁵ and award the non-employed spouse some share in it, a share that will be paid at the future time when the employed spouse begins to receive the annuity. This procedure should be possible for awards compensating for investments in earning capacity as well.

The primary objection, just as with the present value award of pensions, seems to be to the extent that we must wait for payment, the marriage does not end in a "clean break."⁷⁶ Courts cannot predict the employment future with any accuracy, so they must make adjustments or modifications in the future.⁷⁷ As I have noted, some states do this anyway with pensions (for contingencies controllable or not by the employee). Besides, as many before me have argued, divorce is *not* a clean break.⁷⁸

V. Why The Clean Break of No-Fault Divorce Will Not Work

When stock is sold, the present value of current capital and future dividends are reflected in the stock's price. But divorce does not mean reentry into something like the stock market. There may be no intent to remarry,⁷⁹ and the success (*vel non*) of the business part of the enterprise is necessarily confused with other personal characteristics such as the working partner's tendencies toward substance abuse, physi-

74. See, e.g., *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

75. See, e.g., *In re Hobbs*, 442 N.E.2d 629 (Ill. App. Ct. 1982); *Mitchell v. Mitchell*, 355 S.E.2d 18 (Va. Ct. App. 1987); VA. CODE ANN. § 20-107.3 (Michie 1994). See also the Employee Retirement Income Security Program (ERISA), 29 U.S.C. § 1056(d)(3) (1997) (allowing a deferred award of a federal pension). Present value is discussed *infra*, note 139.

76. See, e.g., *Moore v. Moore*, 553 A.2d 20 (N.J. 1989); *DeWan v. DeWan*, 506 N.E.2d 879 (Mass. 1987); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986). See generally REGAN, *supra* note 48, at 143. The "clean break" concept was suggested in Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 313 (1987). See also Ellman, *supra* note 30.

77. To make up for uncertainty, the stock price will be lower if the risk of no return is higher. See BREALEY & MYERS, *supra* note 44.

78. See, e.g., Kay, *supra* note 76, at 313; Ellman, *supra* note 30. For a British example, see Pamela Symes, *Indissolubility and the Clean Break*, 48 MOD. L. REV. 44 (1984). For criticism of the clean break concept, see MARSHA FINEMAN, *THE ILLUSION OF EQUALITY* (1991); June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUSTON L. REV. 359 (1994).

79. See, e.g., ENGLAND & FARKAS, *supra* note 49, at 67-68.

cal violence, or infidelity. There is no immediate and accurate valuation of the spouse's worth.⁸⁰

Besides, stock purchase is the quintessential contract at will. Marriage is not, they are what economists call externalities.⁸¹ The state makes it relatively difficult to exit marriage because the institution itself has value as the basic building block of society⁸² or as a signal of the spouses' characteristics, physical and mental⁸³ and because of its important childrearing functions.

Most of the time, divorce involves minor children.⁸⁴ Whether or not we characterize them as unwilling victims of their parents' decision to separate, they are affected. These effects may be temporary, as with the emotional or relocation costs of divorce,⁸⁵ the probable lowered standard of living, or the immediate loss of a continued parental contact. Children also lose over the very long-term according to a number of studies.⁸⁶ Thus arguably there can be no clean break when children are involved. The presence of children makes divorce sticky for another reason. Children

80. *Eslami v. Eslami*, 591 A.2d 411 (Conn. 1991) (objecting to an award of goodwill).

81. Definitions of externality include Richard Epstein, *Why Restrain Alienation*, 85 COLUM. L. REV. 970, 970 (1985). POSNER, *supra* note 11, at § 8.1; SCHNEIDER & BRINIG, *supra* note 1, at 387. Externalities are applied to surrogacy in Margaret Friedlander Brinig, *A Maternalistic Approach to Surrogacy*, 81 VA. L. REV. 2377 (1995); June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Agreements*, 28 SANTA CLARA L. REV. 581, 590-97 (1988). MAXWELL STEARNS, PUBLIC CHOICE AND PUBLIC LAW; READINGS AND COMMENTARY 356 & n.6 (1996), uses the concept of externality to apply to legislator's behavior.

82. *Maynard v. Hill*, 125 U.S. 190, 205 (1888); REGAN, *supra* note 48.

83. Both insurers and employers prefer married over single men. See, e.g., *Why Do Married Men Earn More than Unmarried Men?*, 20 SOC. SCI. RES. 29 (1991); FUCHS, *supra* note 34, at 88.

84. This is apparently around 60%. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *Child Custody and Child Support*, CURRENT POPULATION REPORTS, Special Series 8 (Series P-23, No. 84, 1979).

85. This may be akin to the structural unemployment when sectors of the market close down or retool. See, e.g., Jeffrey Parker, *Structural Unemployment in the United States: The Effects of Interindustry and Interregional Dispersion*, 30 ECON. INQ. 101 (1992).

86. See, e.g., Barbara Defoe Whitehead, *Dan Quayle Was Right: Harmful Effects of Divorce on Children*, 271 THE ATLANTIC 47 (1993). For more scholarly accounts, see, e.g., Mavis Hetherington, Martha Cox & Roger Cox, *Effects of Divorce on Parents and Children*, in NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (M.E. Lamb ed., 1982); Mavis Hetherington, Martha Cox & Roger Cox, *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 J. AMER. ACAD. CHILD PSYCHIATRY 24:518 (1985); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE (1989); JUDITH S. WALLERSTEIN & JOAN B. KELLEY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 349 (1991).

imply (in nearly all cases) that at least one caretaker must sacrifice leisure time and employment time for them.⁸⁷ Losses to the caretaker's career, whether the children are born early or late in the marriage, are permanent and estimated at 1.5 percent of total future earnings per year out of the job market.⁸⁸ If flexible employment must be accepted following divorce because, for example, there is not the money to hire a full-time nanny, the loss accepted during the marriage (at the time the child is conceived or born) continues after divorce.⁸⁹ The analysis made thus far completely ignores the need for ongoing contact between divorcing parents to accommodate child support and visitation. These necessary (and, from the child's perspective, overwhelmingly desirable) connections⁹⁰ also preclude any clean break. The more involved the parents remain the better as far as the child is concerned.⁹¹

One of the reasons both for investment and against a clean break is the kind of role the parents' relationship plays in their child's upbringing. Ira Lupu refers to this in the constitutional language of balancing, or separating, powers.⁹² One parent restrains the other who may act too hastily or too much out of self-interest and therefore harm the

87. To this extent I completely agree with Martha Fineman. Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995). See also GARY BECKER, *TREATISE*, *supra* note 46, at 43:

Specialization of tasks, such as the division of labor between men and women, implies a dependence on others for certain risks. Women have traditionally relied on men for provision of food, shelter and protection, and men have traditionally relied on women for the bearing or raising of children and the maintenance of the home.

88. Saul D. Hoffman, *Divorce and Economic Well-Being: The Effects on Men, Women and Children*, DEL. LAW. (Spring 1987) (suggests that 40% of the wage gap between men and women may be due to such reductions). See also Donald Cox, *Panel Estimations of the Effects of Career Interruptions on the Earnings of Women*, 22 ECON. INQUIRY 386 (1984); Thomas D. Oldham, *Putting Asunder in the 1990s*, 80 CALIF. L. REV. 1091, 1108 & n.82 (1992).

89. Thus, I disagree with the ALI Tentative Draft, *supra* note 5, which counts only sacrifices made during the marriage itself.

90. See, e.g., *Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996). See generally Karen Czipanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTG. L. J. 619 (1989).

91. Ira Lupu, *Mediating Institutions: Beyond the Public/Private Distinction: The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994); Yoram Weiss & Robert Willis, *Children as Collective Goods in Divorce Settlements*, 1 J. LAB. ECONS. 15 (1985); MARGARET F. BRINIG & F.H. BUCKLEY, *JOINT CUSTODY AND SOCIETY* (Working Paper, George Mason Univ. Sch. of Law 1996). On the positive aspects of consensual solutions to dissolution problems, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956-57 (1979); Marjorie Schultz, *Contractual Ordering of Marriage; A New Model for State Policy*, 70 CALIF. L. REV. 204, 264 (1982).

92. Lupu, *supra* note 91.

child. I like to think in the economic terms of complementarity.⁹³ In childrearing terms, one parent functions as the right shoe, the other the left.⁹⁴ Both are necessary, but they do different things. The same-sex parent may act as role model plus disciplinarian or provider or chauffeur. The opposite-sex parent may educate the child in how best to deal with the opposite sex in future relationships and may also instill morality, or secure medical care, or coach the soccer team. Child rearing, thus, is a joint productive activity of the marriage.⁹⁵

As others have written before,⁹⁶ developing the atmosphere in which the joint enterprise can flourish most often requires an unequal, uneven, sharing of the unpaid work.⁹⁷ The lack of protection for the homemaker, particularly, has caused a spate of articles suggesting pension protection,⁹⁸ equal division of assets,⁹⁹ and changes in the tax code.¹⁰⁰ None of these ideas necessarily conflicts with the premises of this article, and perhaps a combination of them will prove most satisfactory for eventual legislative activity.

Implementation of shared earning capacity involves answering several questions. If marriage, at least in part, is an investment by the spouses in each other's earning capacity, the decision maker on divorce has to answer several questions. First, the court must decide exactly

93. MARGARET F. BRINIG, *THE LAW AND ECONOMICS OF THE FAMILY* ch. 4 (forthcoming 1997).

94. Complementary goods are those that are both necessary for some productive activity. Another example is tennis balls and tennis racquets, both needed to play the game. HAL VARIAN, *INTERMEDIATE MICROECONOMICS* 103 (1987). When the price of one good declines, there will therefore be more consumption of both. Think, for example, of what happens to sugar consumption when coffee prices decrease.

95. It should come as no surprise that the Catholic marriage service includes children as an important factor, and canon law as an important ingredient in a sacramental marriage. See, e.g., William Morrissey, *Proposed Changes in Canonical Matrimonial Legislation*, 20 CATH. LAW. 30 (1974).

96. Carol Bruch, *supra* note 47; Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

97. PARKMAN, *supra* note 35; W. Keith Bryant, *The Family and Technology*, 20 HUM. ECOLOGY FORUM 11 (1992); Cathleen D. Zick, & Jennifer Geurer, *Family Compensation and Investment in Household Capital: Contrasts in the Behavior of Husband-Wife and Female-Headed Households*, 21 J. CONS. AFFAIRS 21 (1987); Cathleen D. Zick, & Jennifer Geurer, *Trends in Married Couples' Time Use: Evidence from 1977-78 and 1987-88*, 24 SEX ROLES 459 (1991).

Carol Rose suggests that the greater altruism of women in families justifies some sort of "leveling" reimbursement on divorce. Carol Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992).

98. Gillian Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89 (1994); Mary O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TULANE L. REV. 1421 (1993).

99. Bruch, *supra* note 47; Starnes, *supra* note 53.

100. Staudt, *supra* note 64.

what sort of investment was made: how much of a spouse's career stems from pre-marriage training and experience, and how much from growth during the marriage.¹⁰¹ As we have already mentioned in passing, a way to approach this problem is to look at the wage rates of people generally. In most occupations, a person is hired at a relatively low wage, works for a number of years acquiring the skills necessary to be most productive for the employer, and works at peak nearly until retirement.¹⁰² The increase in wages over this life of employment comes from at least two factors: the need to keep pace with inflation, which is tied to "efficiency wage" theory,¹⁰³ and the need to pay the worker his or her marginal product of labor,¹⁰⁴ which increases during the lifetime work cycle.¹⁰⁵ In other words, as the human capital the employed person brings to the task increases, the wage rises. The difference between the wage increase and the rate of inflation is presumably due to the increase in the employee's human capital.

The second resembles the award of future earnings as part of a workmen's compensation¹⁰⁶ or wrongful death claim:¹⁰⁷ what is the expected value of the spouse's future career? The addition made during the marriage will be a fraction of this total expected value.¹⁰⁸ The third question depends upon the state's general property division laws and whether there is a presumption or requirement of equal division.¹⁰⁹ Further, the fact that one spouse studied or went to endless meetings

101. As we have noted, some economists see the investment as quite a small one, but I would argue that it is far larger. See, e.g., PARKMAN, *supra* note 10, at 147.

102. See, e.g., ENGLAND & FARKAS, *supra* note 49.

103. See, e.g., ANDREW WEISS, EFFICIENCY WAGE MODELS: UNEMPLOYMENT, LAYOFFS, AND WAGE DISPERSION (1990). Efficiency wages are the amounts paid by employers to keep valued workers performing well on the job. They must be higher than what the workers would receive either through unemployment compensation or through the job they would likely obtain if fired.

104. The marginal product of labor is the amount added to total output resulting from the employment of an additional unit of labor.

105. FUCHS, *supra* note 34.

106. See, e.g., *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). See also *American Bank & Trust Co. v. Community Hospital*, 683 P.2d 670 (Cal. 1984) (upholding California's medical malpractice act).

107. See, e.g., *Delta Airlines, Inc. v. Ageloff*, 552 So. 2d 1089 (Fla. 1989); STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH 2d (Lawyers Co-op 1975). For a present value table as it appears, see *id.* § 8.4. See generally Michael T. Brody, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings*, 49 U. CHI. L. REV. 1003 (1982).

108. PARKMAN, *supra* note 10, at 147.

109. States requiring equal division include: California, CAL. FAM. CODE § 2550 (West 1994); Louisiana, LA. REV. STAT. ANN. § 9:2801(4)(b) (West 1983); New Mexico, *Michelson v. Michelson*, 520 P.2d 263, 266 (N.M. 1974). Wisconsin, among other states, presumes it. See also ALI Tentative Draft, *supra* note 5, § 4.15; Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM*

while the other worked or provided relief from household chores¹¹⁰ may arguably give the student or manager a greater share. There may or may not be other assets that can be offset against the earning capacity.¹¹¹ Finally, as with pensions, payout need not occur until the time the income is actually realized, so it could be adjusted in case of illness or injury or involuntary unemployment.¹¹² An earning capacity is just like any other asset, so that the investor-spouse should be compensated for contributions to the other's career.

Before we conclude our thoughts, we need to address the role fault should play. The idea that fault should count probably stems from the same confusion between alimony and property division that permeates the whole inquiry.¹¹³ In many states, fault is relevant for the court granting alimony.¹¹⁴ Fault may be relevant for historical reasons,¹¹⁵ but more likely is considered because of the claim on future earnings alimony represents.¹¹⁶ Property involves contribu-

AT THE CROSSROADS 6, 13 (Steven Sugarman & Herma Hill Kay, eds. 1990). But some states reject even the presumption. *See, e.g.,* Rothman v. Rothman, 320 A.2d 496 (N.J. 1974).

110. *See, e.g.,* Mullen v. Mullen, 49 S.E.2d 349 (Va. 1948). The husband, a self-proclaimed genius at chemistry, worked seven days a week, ten hours a day during World War II and afterwards, leaving the wife and their daughter at his parent's spacious Richmond home.

111. *Graham v. Graham*, 574 P.2d 75, 77 (Colo. 1978). Weitzman, *supra* note 13 (finding that in most modern marriages there were few other assets).

112. Risk-adjustment at the outset, while in some ways more certain, fixes the earning spouse in a way that many think undesirable. Advocates of the mechanism are Daniel D. Polsby & Martin Zelder, *Risk-Adjusted Valuation of Professional Degrees in Divorce*, 23 J. LEGAL STUD. 273 (1994). The fact that property awards cannot be modified is noted in *DeWitt v. DeWitt*, 296 N.W.2d 761, 768 (Wis. 1980) ("Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties' circumstances, a property division may not.") (citing old Wis. STAT. § 767.32 (1977)).

113. Separating the two made complete sense historically:

Alimony has never been defined here by statute; but, from the beginning, it has never been considered, as in some States, as a division of property. It "is a maintenance afforded to the wife, where the husband refuses to give it, or where from his improper conduct compels her to separate from him. It is not a portion of his real estate, to be assigned to her in fee simple . . . but a provision for her support, to continue during their joint lives, or so long as they live separate."

Wallingsford v. Wallingsford, 6 H. & J. 485, 488 (Md. 1823).

114. The ALI Principles' Reporter's Notes lists 30 states where fault plays at least a minor role in the granting of alimony. ALI Tentative Draft, *supra* note 5, at 61.

115. For further discussion, *see, e.g.,* *Courson v. Courson*, 129 A.2d 917 (Md. 1957). For a list of cases, *see* 34 A.L.R. 313, 321 (1954).

116. *See, e.g.,* HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 16.1, at 621 (2d ed. 1988) ("Alimony continues the support which the wife was entitled to receive while the marriage existed."). Clark cites *Dayton v. Dayton*, 161 S.W.2d 618 (Ky. 1942); *Wolfe v. Wolfe*, 124 N.E.2d 485 (Ohio Com. Pl. 1954); *Bray v. Landergren*, 172 S.E. 252 (Va. 1934).

tions that are more akin to "sunk" or historical costs¹¹⁷ where subsequent fault would not seem to play a role. In fact, fault only plays a role in property distribution in eighteen states, compared to the thirty that consider it for alimony.¹¹⁸

In the days before property distribution, a husband who earned money as the family breadwinner and titled purchased assets in his own name got to keep "his" property even if he was also a philanderer or an alcoholic or a spouse abuser.¹¹⁹ His homemaker wife, who had no claim to the property, might have a claim to a portion of his post divorce earnings (as alimony), not so much because she had earned them, but because she was not at fault in ending the marriage. Thus the question of whether fault should "count" probably can be answered most usefully by looking to existing state property division law. Most states do not consider fault in distributing property, as it is currently defined. Since I argue that earning capacity is just another form of property, courts should consider the same factors in making these awards.

VI. Conclusions

Now we return to the questions posed at the outset, hopefully with some answers. The first was why the young professional's spouse might get some share in the newly acquired career while the young military officer's will not. The answer here may lie in the fact that it is middle class litigants themselves who have set the professional degree cases apart from others involving other career enhancements. I suspect, though, that family lawyers have not, to date, argued all these cases are about the same thing: whether earning capacity enhanced by marriage

117. If decisions today are made in terms of opportunity cost, that is, to commit resources to one activity as opposed to another, cost is the value of "the road not taken." Decisions by economic actors rely upon predictions about the future, not upon past events. Past outlays (unless they affect prospective costs) are not costs because they exert no influence on current decisions.

Thus, when the tenured professor gives up his secure job in order to follow his wife to another part of the country as she pursues a more attractive job opportunity, his opportunity costs (his tenured salary) are "sunk." If, some years later, when he has only been able to secure employment without tenure, he commits marital fault, the opportunity costs of the original decision remain the same. He still has lost the expected value of the tenured salary. The question is whether the new decision (whether or not to desert or commit adultery, say) also should take into account the consequences of the original one.

118. ALI Tentative Draft, *supra* note 5, at 61.

119. CLARK, *supra* note 116, § 16.1, at 619 (citing *Cooke v. Cooke*, 2 Phill. Ecc. 40, 161 Eng. Rep. 1072 (1812); *Otway v. Otway*, 2 Phill. Ecc. 109, 161 Eng. Rpt. 1092 (1813)). For a more modern case where the husband squirreled away the money he earned while his wife's was used to support the family, see *Feidler v. Feidler*, 55 D.L.P. 397 (Alberta App. 1978) (but the wife committed a marital offense).

should be treated as a marital asset.¹²⁰ They may not have argued for including enhancements to earning capacity because this requires a fairly sophisticated set of calculations. However, these are not much different from those the contemporary divorce lawyer must frequently make anyway. If, on the contrary, she was most or equally to blame for the marriage's demise, she could not claim entitlement to a share in his earnings.¹²¹ In fact, alimony was like an entitlement in the Robert Reich "new property"¹²² sense: it came not because earned, but because the benefits were expected.

If we now claim, as this article argues we should, that enhancements to earning capacity made during marriage are just another form of marital investment, why should they be subject to the fault rule any more than was the tangible property purchased by the errant husband of old? It is clearly easier to see why fault should not play a role where the investing spouse has actually put money into the other spouse's business or paid for his education. It is harder to see why it should not matter if the contributions are the more subtle, service-based ones of the homemaker who entertains or irons shirts at the same time she drinks in secret or entertains the postman or the famous photographer.¹²³ Perhaps there is moderate-range difficulty with the wife who quits her high paying job to accommodate her husband's career (or their child) and then develops, out of boredom or frustration, a drinking problem.¹²⁴

In fact, we might break the fault cases into four representative categories:

1. Career-enhanced spouse was at fault, but the fault was irrelevant to the enhanced earning capacity¹²⁵;

120. WEITZMAN, *supra* note 13, at 109 (sagely pointing out that human capital (enhanced earning capacity) is the "diamond" among the other marital jewels).

121. Fault thus served to identify those cases in which one party had so flouted his or her marital duties that the other deserved to be released from the duties of a relationship that had effectively ceased to exist. J. BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION* § 1452 (1891). *See also* Franklyn C. Setaro, *A History of English Ecclesiastical Law*, 18 B.U. L. REV. 1021, 1021-23 (1938); MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* (1972).

122. Robert Reich, *The New Property*, 73 YALE L.J. 733 (1964).

123. Thus the wife in the motion picture *The Bridges of Madison County* had already earned her share in her husband's farm when she was involved for four days with the photographer. She resumed faithful performance of the marital duties immediately afterwards and continued her performance for the rest of her life.

124. For a similar example, *see* Mullen v. Mullen, 49 S.E.2d 349 (Va. 1948) (wife ultimately deserted the husband).

125. *See, e.g.,* O'Loughlin v. O'Loughlin, 458 S.E.2d 323 (Va. Ct. App. 1995) (husband's infidelity had a negative impact on the well-being of the family); Crump v. Crump, 1993 WL 445358 (Va. Ct. App. Sept 7, 1993)

2. The career-enhanced spouse was at fault and the fault was relevant to the accumulation of earning capacity or wealth¹²⁶;
3. The working spouse was at fault, but the fault was irrelevant to the investment in the other's career¹²⁷; and
4. The working spouse was at fault and the fault was relevant to the enhancement of the other's career.¹²⁸

It would seem that the fact most states have recognized¹²⁹ fault should play a part only if relevant, as in cases two and four, to the accumulation or dissipation of marital wealth.

Does a fault-based division between alimony and property make any sense, given no-fault divorce? Not really. If earning capacity is most couples' greatest asset, and alimony ceases to be a private welfare system based on need, then doctrinally there is little difference. States may have to readjust their rules about modification and such things as exemption from bankruptcy¹³⁰ if earning capacity awards are put into the current "property" rubric, rather than becoming, as the ALI has suggested, part of "compensatory spousal payments."¹³¹

Reimbursement for lost career opportunities plus a share in the cou-

126. *See, e.g., Srinivasan v. Srinivasan*, 396 S.E.2d 675 (Va. Ct. App. 1990) (husband made enormous sacrifices for wife that diminished his own career opportunities).

127. *See, e.g., Stallings v. Stallings*, 393 N.E.2d 1065 (Ill. App. Ct. 1979) (wife brought most of the money into the marriage, supported the family, and took care of husband's six children from a prior marriage, while the husband dissipated much of her estate through a series of "business misadventures"); *Smith v. Smith*, 331 S.E.2d 682, 687 (N.C. 1985) (wife used alcohol to excess and deserted husband and children. Husband, a retired military officer, helped wife obtain her Master of Library Science degree, and at the time of divorce earned \$9,800 compared to her \$11,000 per year). *See also Carbone & Brinig, supra* note 58, at 1004 & n.214, case 1.

128. *See, e.g., Westbrook v. Westbrook*, 364 S.E.2d 523 (Va. Ct. App. 1988).

129. *See, e.g., CAL. FAM. CODE* § 2602 (West 1996); *Burtscher v. Burtscher*, 563 S.W.2d 526 (Mo. App. 1978) (husband committed adultery at the time of separation; wife played bingo over her husband's objection four nights a week during the marriage); *Chalmers v. Chalmers*, 320 A.2d 478, 483 (N.J. 1974); *Blickstein v. Blickstein*, 472 N.Y.S.2d 110 (N.Y. App. Div. 1984); *Peirson v. Calhoun*, 417 S.E.2d 604, 606 (S.C. Ct. App. 1992); *Aster v. Gross*, 371 S.E.2d 833 (Va. Ct. App. 1988).

130. Alimony and child support are typically exempt; property division is not. *See, e.g., In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983); 11 U.S.C. § 522(d)(10)(D) (1996); *CAL. FAM. CODE* § 3592 (West 1996). *See generally* Sheryl Scheible, *Defining "Support" Under the Bankruptcy Law: Revitalization of the "Necessaries" Doctrine*, 41 VAND. L. REV. 1 (1988).

131. ALI Tentative Draft, *supra* note 5, § 4.07(1), at cmt. a notes:

Section 4.07 provides that spousal skills and earning capacity are not divisible property. An increment in spousal earning capacity during marriage therefore creates no property claim. Relative earning capacity is nonetheless relevant at divorce because it can give rise to a claim for compensatory payments.

ple's tangible property is only sometimes fair compensation.¹³² It will only be sufficient when the lost career opportunities approximately equal the gain to the other's enhanced career, plus interest (the ordinary rate of return).¹³³ Sometimes the "investing" spouse may not have lost much, if anything, in terms of career potential.¹³⁴ Should such a fortunate person nonetheless be given no reimbursement for an investment to the other's career? Sometimes the amount sacrificed will exceed the amount gained.¹³⁵ My argument here, unless there are large sums in other assets to spread around, is that in these cases the presumptive amount (the expected value of the career enhancement) may be modified if the income that eventually comes in is, through no fault of the benefited spouse, lower than expected.¹³⁶

We have already noted the objection that allowing for distribution of enhanced earning capacity may prolong ties between people who are legally free to pursue separate lives. Such continued relationships may be avoided if they can agree the expected value of the enhancement, like property, cannot be modified in the future,¹³⁷ discount this amount to present value,¹³⁸ and transfer the sum at the time of divorce. If the

132. This is the suggestion made in the ALI Tentative Draft, *supra* note 5. It seems to form some of the basis for the award in *Mahoney*, and, more explicitly, for that in *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Haugan v. Haugan*, 343 N.W.2d 796, 803 (Wis. 1984) (the court fears that anything but calculation of the expected stream of income may give the student spouse a windfall and fail to recognize the supporting spouse's expectations). For a criticism of the ALI proposal, and an alternative suggestion of a more technical nature (relating earning capacity to acquisition of annuities), see ALAN KOZELA, VALUING ADDITIONS TO A SPOUSE'S HUMAN CAPITAL FINANCED BY THE MARITAL ESTATE (working paper, George Mason University Department of Economics, 1996).

133. We are thus back to the discussion of Fuller and Perdue made in *Brinig & Carbone*, *supra* note 45. *Inman v. Inman*, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979) (interest was in fact awarded).

134. This was true of Ms. Graham and Mrs. Gagliano, both of whom ended up with nothing despite their work to further their husbands' careers. *Graham v. Graham*, 574 P.2d 75, 78 (Colo. 1979); *Gagliano v. Gagliano*, 211 S.E.2d 62 (Va. 1975). Mrs. Inman was able to recover her investment in her husband's degree despite her own career. *Inman*, 578 S.W.2d at 266.

135. See *Srinavisan v. Srinavasan*, 396 S.E.2d 675 (Va. Ct. App. 1990) (the wife, a perpetual student, did not gain tenure at her university, and therefore had to forego her career as an academic. Her husband, meanwhile, had made substantial sacrifices in terms of his own academic advancement).

136. Such a fault might be a voluntary unemployment, or the deliberate choice of a nonlucrative career. See, e.g., *Antonelli v. Antonelli*, 409 S.E.2d 117, 119 (Va. 1991); *Matter of A.I.*, 435 N.Y.S.2d 928 (N.Y. Fam. Ct. 1981).

137. VA. CODE ANN. § 20-109 (Michie 1994) (alimony, now maintenance and support).

138. Discounting to present value requires that the decision maker calculate how much a sum today is likely to appreciate over the future (when the full amount would be due). The present value for a \$300 payment to be made in three years, expecting 3% interest, is $\$300 \div (1.03 \times 1.03 \times 1.03) = \282.86 .

risks are assumed in the computation of present value, the enhanced spouse has the "average" incentive to work hard. This begs the question of whether people who divorce are in fact average in terms of their work ethic and risk-taking propensities.¹³⁹ Of course, to the extent the investing spouse relies on delivery of payments in the future, he or she is tied to the other's earning capacity. There may be no other alternative if there are few other assets from which a present value award can be made.¹⁴⁰ The working spouse's share may be like the equitable lien favored by community property states for occasions in which one spouse invests in the separate property of the other.¹⁴¹ Some states might decide to have payments made directly from the employer of the spouse who benefitted. Perhaps, more controversially, the idea that the relationship can be neither easily nor cheaply discarded will cause some spouses to work a bit harder on their marriages.¹⁴²

These questions do not account for all cases where compensatory payments ought to be made. There may well be investments in children that do no more than hold both spouses' earnings on an even keel.¹⁴³ Marriage, after all, is not just about, or even mainly about, creating wealth in the financial sense.¹⁴⁴ There may also be career moves for

139. For a suggestion that they may in fact be more risk-seeking and entrepreneurial, see Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201, 221 (1996).

140. This is an argument for deferring receipt of pensions even though immediate payment of the share's present value may be preferable. See, e.g., *In re Nelson*, 746 P.2d 1346 (Colo. 1987); *Pulliam v. Pulliam*, 796 P.2d 623, 626 (Okla. 1990).

141. For an example of how the equitable lien works in the family law context, see *Robinson v. Robinson*, 429 N.E.2d 183 (Ill. App. Ct. 1981) (Wife and husband made improvements on property that belonged to the husband's parents. Upon their divorce, husband and wife had an equitable lien on the property and could force a sale.). See generally Joan Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253 (1989).

142. For example, see G.K. Chesterton, *The Superstition of Divorce*, in IV COLLECTED WORKS (1987).

143. Both Ira Ellman's *Theory*, *supra* note 30, and the ALI Tentative Draft, *supra* note 5, provide for children.

144. To return to my students, this seems one of their primary objections to BECKER TREATISE, *supra* note 46. See Brinig, *supra* note 37. See, e.g., *Wisner v. Wisner*, 631 P.2d 115, 123 (Ariz. Ct. App. 1981):

[I]n the absence of such an agreement, we believe it is improper for a court to treat a marriage as an arm's length transaction by allowing a spouse to come into court after the fact and make legal arguments regarding unjust enrichment by reason of the other receiving further education during coverture. In the absence of a specific agreement, such legal arguments simply do not fit the context of a marital relationship. In each marriage, for example, the couple decides on a certain division of labor, and while there is a value to what each spouse is doing, whether it be labor for monetary compensation or homemaking, that value is consumed by the community in the on-going relationship and forms no basis for a claim of unjust enrichment.

lifestyle purposes (for example, to a teaching career from practice, or to a climate more suitable to an allergy sufferer) that make the marriage better off but do not make sense from a money-in-the-pocket standpoint.¹⁴⁵ In any case, the resulting fairness among divorcing couples (middle class versus those who are not) and among the spouses themselves (between career enhancer and career-enhanced) certainly seems worth the effort.

145. These would not be compensated under Ellman's *Theory*, *supra* note 30, restricted to career sacrifices for economically rational reasons. *But see* Jennifer Roback, *Wages, Rents and Amenities: Differences Among Workers and Regions*, 26 *ECON. INQ.* 23 (1988).